

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division**

In re:	:	Chapter 11
	:	
Circuit City Stores, Inc., et al.,	:	Case No. 08-35653 (KRH)
	:	
Debtors.	:	

**RESPONSE OF KELLY BREITENBECHER TO DEBTORS' FIFTY-SIXTH
OMNIBUS OBJECTION TO CLAIMS (DISALLOWANCE OF CERTAIN ALLEGED
ADMINISTRATIVE EXPENSES ON ACCOUNT OF EMPLOYEE OBLIGATIONS)**

COMES NOW Kelly Breitenbecher, ("Ms. Breitenbecher "), by the undersigned counsel, and for her response to *Debtors' Fifty-Sixth Objection to Claims (Disallowance of Certain Alleged Administrative Expenses on Account of Employee Obligations)* ("Objection"), and states as follows:

1. On or about June 29, 2009, Ms. Breitenbecher filed her administrative claim with Debtor's claims agent, Kurtzman Carson Consultants, in the total amount of \$1,502,166.00. On information and belief, the claim has been assigned claim number 13936 (the "Claim"). A copy of the Claim is attached hereto and incorporated in full by this reference as **Exhibit A**. The Debtor's Objection seeks to disallow the Claim entirely.

2. The Claim is based upon an Employment Agreement (the "Agreement"), and a special cash retention award (the "Award")¹. A copy of the Employment and a letter agreement

¹ On or about January 29, 2009, prior to the filing of the claim now subject to this 56th omnibus objection, Ms. Breitenbecher filed a claim in the total amount of \$1,046,083.00. On information and belief, that claim has been assigned claim number 7786. Claim 7786 asserted \$300,000.00 as entitled to administrative expense, and \$746,083.00 as general unsecured. The Debtor, in its 58th Omnibus Objection, has objected to the administrative expense portion of claim 7786. Contemporaneously with the filing of this response to Debtor's 56th Omnibus Objection, Ms. Breitenbecher has also filed a response to Debtors' 58th Omnibus Objection.

for the Award is attached to the Claim.

A. The Special Cash Retention Award

3. The initial vesting date under the Award was January 1, 2009. Ms. Breitenbecher was employed by the Debtors until April 17, 2009. Thus, \$300,000.00 of the Award fully vested on January 1, 2009.

4. As the vesting of the Award was post petition, and Ms Breitenbecher was employed as of the vesting date, Ms. Breitenbecher asserts this Award is part of her wages and/or salary, and thus pursuant to 11 U.S.C. §503(b)(1)(A)(i) is entitled to administrative expense status. In that at least a portion of the Award would have accrued post petition, Ms. Breitenbecher should be allowed, at a minimum, to a pro rata amount of the Award for her post-petition services as an administrative expense. See In re Hechinger Investment Company of Delaware, 298 F.3d 219 (3rd Cir. 2002); In re Lason, 309 B.R. 441 (Bankr. D. Delaware 2004).

5. Without waiving the above, Ms. Breitenbecher asserts, in the alternative, the Award has priority under 11 U.S.C. § 507(c)(4), in that at least a portion of the Award was earned within 180 days before the date of the bankruptcy petition or cessation of debtors' business. Cessation of Debtor's business would have been upon the order granting liquidation of the company, or upon completion of liquidation.

B. The Employment Agreement

6. The Claim, as same pertains to the Agreement, is based upon change in control severance benefits, pursuant to Article 9 of the Agreement. In brief, upon a "change in control," as defined in the Agreement, Ms. Breitenbecher was entitled to: two times her base salary; two times her "target annual bonus"; two times health and related plan benefits; the value of 6 months outplacement services; and car allowance and legal fees. A change in control included,

inter alia, the “sale or other disposition of all or substantially all of the assets of the Company ...”. Agreement, para. 9.2(c).

7. These benefits under Article 9 are severance benefits. Additionally, they are “earned” at the time of termination (i.e., April 17, 2009). As such, they are a cost of administering doing business post petition and thereby entitled to administrative expense status. See, e.g., Strauss-Duparquet, Inc. v. Local 3, International Brotherhood of Electrical Workers, 386 F.2d 649 (2nd Cir. 1967); In re W. T. Grant Co., 620 F. 2d. 319 (2d Cir.), cert denied, 446 US. 983, 100 S. Ct. 2963, 64 2. Ed. 2d 839 (1980).

8. The person with knowledge of this claim is Kelly Breitenbecher, as identified above. Documents supporting the claim were attached to the claim as filed.

9. There were certainly other employees of Circuit City familiar with, or having knowledge of, the Agreement and Award, and Circuit City may have documents pertaining to the Award. As such, Ms. Breitenbecher reserves her right to supplement this Response in advance of any final hearing on the Objection.

WHEREFORE, Kelly Breitenbecher respectfully requests the Court overrule the Objection, and allow Ms. Breitenbecher’s claim as filed, and grant such further relief as is just and proper under the circumstances.

**Respectfully Submitted,
KELLY BREITENBECHER**

By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2009, a true and accurate copy of the foregoing was electronically filed with the Clerk of the Bankruptcy Court for the Eastern District of Virginia, Richmond Division, using the CM/ECF system, which thereby caused the above to be served electronically on all registered users of the ECF system that have filed notices of appearance in this matter, and was mailed by U.S. Mail, first class, postage prepaid, to all persons on the below Service List:

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